FRANKY CONSTRUCTION SDN BHD

v.

MEC INDUSTRIAL PARK SDN BHD

HIGH COURT MALAYA, KUANTAN
RAMLY ALI J
[APPLICATION FOR EXECUTION NO: 37-6-1998]
12 JUNE 2002

CIVIL PROCEDURE: *Execution - Writ of seizure and sale - Prohibitory order - Debtor company taken over by Danaharta - Appointment of Special Administrator - Effect - Whether creditor barred from enforcing judgment - Extension of writ and prohibitory order after appointment of Special Administrator - Whether a step to enforce judgment - Whether null and void - Whether an abuse of process - Pengurusan Danaharta Nasional Berhad Act 1998, ss. 41(1), 42(2), 44, 45(2), 46(4), 47(2)*

COMPANY LAW: *Suit against company - Execution of judgment by writ of seizure and sale and prohibitory order - Company taken over by Danaharta - Appointment of Special Administrator - Effect - Whether execution could not be proceeded upon - Extension of writ and prohibitory order after appointment of Special Administrator - Whether null and void - Whether an abuse of process - Pengurusan Danaharta Nasional Berhad Act 1998, ss. 41(1), 42(2), 44, 45(2), 46(4), 47(2)*

The plaintiff had obtained a judgment against the defendant for RM8.9 million and had taken out a writ of seizure and sale ('the writ') and a prohibitory order ('the Order') against the property of the defendant. Subsequently, pursuant to the provisions of the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'), the defendant was taken over by Danaharta Corporation ('Danaharta') and a Special Administrator was appointed for the purpose. It was not in dispute that the Special Administrator had since prepared a proposal for the creditors pursuant to s. 44 of the Act, which Danaharta duly approved. The plaintiff knew about the appointment of the Special Administrator, or the subsequent surrender of the defendant's lands, the subject matter of the Order, to the State Government, but that notwithstanding, the plaintiff proceeded to renew and extend the writ and the Order even after the said appointment and surrender had come into force. According to the plaintiff, the renewals and extensions of the instruments were necessary so as to maintain the *'status quo'* and preserve their right to act against Danaharta or the Special Administrator. The defendant argued that the renewals and extensions of the writ and the Order

constituted an attempt to execute judgment on the defendant's assets, and that being so the same were *ultra vires* s. 41 of the Act. The defendant further argued that the extensions were an abuse of process and in the circumstances applied to strike out both the writ and the Order.

Held:

[1] There is no merit in the contention that the Special Administrator had no *locus standi* to institute the present application. The powers of the Special Administrator under the Act are far-reaching and wide – much wider than the powers of a company's board of directors. The Second Schedule to the Act has listed out 26 powers of the Special Administrator, and by paras. 7 and 8 thereof, the present application could clearly be initiated by the Special Administrator. (p 287 c-g)

[2] Section 41(1)(d)(ii) & (e) of the Act prohibits the execution of a judgment on any asset of the affected person without the prior written consent of Danaharta. In the context of the present case, the Order is clearly a 'step to enforce a judgment' within the meaning of s. 41(1)(d) (ii) of the Act. Likewise, it is a 'proceeding or other legal process' against the defendant within the meaning of s. 41(1)(e) of the Act. (pp 287 h-i & 288 h-i)

[3] The argument that s. 41 of the Act did not apply as the writ and the Order were already in force when the Special Administrator was appointed is unsustainable. A prohibitory order which has a life span of six months constitutes the first step in execution proceeding. Its continued extension is thus essential for the carrying out of execution proceeding, and that being so, each application to extend an order constitutes 'a step taken to enforce a judgment over the asset of the affected person' within the meaning of s. 41. In the circumstances, the applications to renew or extend the writ and the Order after the appointment of the Special Administrator herein, being a step to enforce a judgment over the assets of the defendant, must need the prior written consent of Danaharta. The plaintiff has not obtained such consent and the failure must result in the applications and the relevant orders made null and void. (pp 289 a-g & 290 b-c)

[4] In applying to renew and extend the Order, the plaintiff had not informed the court about the surrender of the defendant's lands to the State Government. The plaintiff was also not sincere in dealing with this matter when, in opposing the defendant's application herein, they denied any knowledge as to the appointment of the Special Administrator, whereas in their 3rd to 7th applications to renew the Order, they admitted to being

aware of the appointment. The facts also showed that the Order was renewed not for the purpose of executing a judgment by way of seizure and sale, but for the collateral purpose of 'maintaining the *status quo* in order to preserve the plaintiff's right to take appropriate action against Danaharta and/or the Special Administrator'. All these are an abuse of the process of the court. (pp 292 e-i & 293 a-e)

[5] Upon the provisions of ss. 42(2), 44, 45(2), 46(4)(b) and 47(2) of the Act, and considering the fact that the implementation of the proposal as prepared by the Special Administrator and approved by Danaharta could not be carried out so long as the writ and the Order stand registered, the registration of the same must of necessity be set aside and cancelled. (pp 291 e-i & 292 d)

[Application granted.]

Case(s) referred to:
Ban Hin Lee Credit Sdn Bhd v. Utama Computer Centre Sdn Bhd & Ors [1991] 1 CLJ 711; [1991] 2 CLJ (Rep) 332 HC ***(refd)***
Karuppiah Chettiar v. Subramaniam [1971] 2 MLJ 116 ***(refd)***
Keystart Sdn Bhd v. Forgetech Sdn Bhd [1998] 2 AMR 1280 HC ***(refd)***

Legislation referred to:
National Land Code, s. 338(1)
Pengurusan Danaharta Nasional Berhad Act 1998, ss. 23, 24, 30, 41(1)(d)(ii), (e), (2), (3), (7), (8), 44, 45(2), 46(4)(b), 47(2), (3), 48
Rules of the High Court 1980, O. 43 r. 11, O. 47 r. 6(5)

Other source(s) referred to:
Mallal's Supreme Court Practice, vol 1, 2nd edn, p 225

For the plaintiff - R Sarengapani; M/s Vendargon & Partners
For the defendant - Johnston Yap; M/s Yap & Co

Reported by WA Sharif

JUDGMENT

Ramly Ali J:
Enclosure 62 is an application by the defendant, through a special administrator duly appointed by Danaharta under the Pengurusan Danaharta Nasional Berhad Act 1998, (Danaharta Act) to strike out the writ of seizure and sale dated 6 October 1998 and Prohibitory Order dated 16 October 1998 obtained by the plaintiff. The defendant relies primarily on s. 41 of the Danaharta Act 1998 (as amended in 2000) which prohibits execution of judgment on any asset of the affected person without the prior written consent of Danaharta.

Factual Background

The plaintiff had, *vide* Kuantan High Court, Civil Suit No. 22-35-1998, obtained a summary judgment against the defendant on 21 September 1998 for a sum of RM8,936,493.26 together with interest at the rate of 8% p.a. from 20 April 1998 until full satisfaction and costs. On 4 October 1998 the plaintiff filed for a writ of seizure and sale against the defendant for the purpose of enforcing the said summary judgment. Accordingly, a writ of seizure and sale was issued on 6 October 1998 and a Prohibitory Order was also issued on 16 October 1998, in respect of the following properties held by the defendant under:

(a) PN 2807, Lot 49647, Mukim Kuala Kuantan

(b) PN 2808, Lot 49648, Mukim Kuala Kuantan

(c) PN 2809, Lot 49649, Mukim Kuala Kuantan

(d) PN 2816, Lot 49656, Mukim Kuala Kuantan

(e) PN 2817, Lot 49657, Mukim Kuala Kuantan.

The said Prohibitory Order was duly registered on 17 October 1998 *vide* Perserahan No. 1552/1998. The said writ of seizure and sale was extended every one year and the last extension was granted *vide* Court Order dated 28 September 2001, whereby it was further extended until 4 October 2002. Similarly the Prohibitory Order was also extended every six months and the last extension was granted *vide* Court Order dated 28 September 2001, whereby it was further extended until 2 April 2002 under s. 338(1) of the National Land Code and O. 47 r. 6(5), Rules of the High Court 1980. All the extensions were granted on the applications made by the plaintiff.

In the meantime, the defendant was placed under Danaharta. On 9 September 1999 a Special Administrator was duly appointed by Danaharta under the relevant provisions of the Danaharta Act, to administer the defendant. Relying on the provisions of s. 41(1)(d) and (e) of the Danaharta Act, the Special Administrator filed an application *vide* encl. 62 for the following orders:

(1) that the writ of seizure and sale dated 6 October 1998 filed by the plaintiff *vide* Application for Execution No. 37-6-98 against the defendant be set aside and/or cancelled forthwith;

(2) that the Prohibitory Order dated 16 October 1998 in respect of the defendant's land held under PN 2807, Lot 49647 and PN 2808, Lot 49648 (both in Mukim Kuala Kuantan), which was extended until 4 October 2002 *vide* Court Order dated 28 September 2001, be set aside and/or cancelled forthwith;

(3) that the Court Order dated 28 September 2001 granting further extension on the said Prohibitory Order is of no effect and to be set aside;

(4) that any proceeding or order giving further extension to the said Prohibitory Order dated 16 October 1998 and any sale, transfer or disposal of the land in question by virtue of the said Prohibitory Order is null and void and should be set aside or cancelled.

The grounds for the said application are as follows:

(a) a Special Administrator for the defendant was appointed by Danaharta having the effect under s. 41 of the Danaharta Act;

(b) the Court Order dated 28 September 2001 granting further extension to the writ of seizure and sale as well as the Prohibitory Order was not valid as it contravened s. 41 of the Danaharta Act;

(c) the said extension which was registered on 2 October 2001 *vide* Perserahan number 3628/2001 was invalid and void as the Prohibitory Order dated 16 October 1998 has lapsed on 26 March 2001;

(d) a proposal for the creditors of the defendant prepared by the Special Administrator pursuant to s. 44 of the Danaharta Act has been approved for implementation by Danaharta under s. 45(2) of the same Act;

(e) all application by the plaintiff to further extend the validity of the Prohibitory Order after the appointment of the Special Administrator is an abuse of court process.

Submission By The Defendant

In supporting the application *vide* encl. 62, the defendant argued that any application to extend the validity of the Prohibitory Order after the appointment of the Special Administrator for the defendant, is prohibited by s. 41(1)(d)(ii) and (e) of the Danaharta Act because the application is considered as a step to execute the judgment obtained against the defendant, unless the plaintiff has obtained a prior written consent of Danaharta.

The defendant also argued that the Special Administrator pursuant to s. 44 of the Danaharta Act has prepared a "Working Proposal" for the creditors of the defendant and the said proposal was approved by Danaharta for its implementation under s. 45(2) of the Danaharta Act. The defendant argued that the said proposal could not be effectively implemented unless the said Prohibitory Order obtained and registered by the plaintiff is set aside or cancelled.

The defendant also submitted that the plaintiff has failed to prove the existence of any special circumstances in applying for the extension of the Prohibitory Order and further submitted that each of the application made was an abuse of the court process.

Submission By The Plaintiff

In opposing the defendant's application, the plaintiff raised the following arguments:

(1) that the said writ of seizure and sale as well as the Prohibitory Order were duly in force in October 1998, well before any vesting of rights in Danaharta. Therefore the operation of s. 41 of the Danaharta Act cannot be retrospective in effect. Subsequent application for renewal or extension of the Prohibitory Order and the writ is not an execution or steps to execute the judgment but only to maintain the *status quo*. Therefore the extensions are not caught by the Danaharta Act particularly s. 41, as they are not executions of judgment;

(2) that at all times, the defendant was represented by the legal firm of Tetuan Haniff and Rajendran who has consented to all extensions of the writ as well as the Prohibitory Order. The Consent Order remained valid until set aside by fresh action by the defendant;

(3) that the Danaharta Act does not vest the Special Administrator with the powers to make the present application. Therefore the Special Administrator has no *locus standi* to make the present application;

(4) that the plaintiff's purpose in maintaining the *status quo* is to give and preserve the plaintiff's right to take action at the appropriate time against Danaharta and/or the Special Administrator for non-compliance with the express provisions of the Danaharta Act.

Findings Of The Court

In the present application, we are dealing mainly on the provisions of the Danaharta Act 1998 which came into force on 1 September 1998 and later amended in 2000. First and foremost, I have to stress here that the Danaharta Act itself is an extraordinary Act of Parliament with special provisions and special powers given to Danaharta for special purposes. The Act itself is to provide special laws for the acquisition, management, financing and disposition of assets and liabilities by Danaharta Corporation; the appointment of Special Administrators with powers to administer and manage persons whose assets or liabilities have been acquired by Danaharta and for matters connected therewith or incidental thereto.

The preamble to the Danaharta Act clearly provides that special provisions are required in the public interest to assist financial institutions by removing impaired assets, to assist the business sector by dealing expeditiously with financially distressed enterprises to promote the revitalisation of the nation's economy by injecting liquidity into the financial system, such goals to be achieved through the acquisition, management, financing and disposition of assets and liabilities. It is also stated in the preamble of the Act that legislation is the only means by which the acquisition, management, financing and disposition of assets and liabilities can be implemented promptly, efficiently and economically for the public good; and that legislation is the only means by which special administrators may be appointed expeditiously to administer and manage persons whose assets and liabilities have been so acquired by Danaharta. Therefore, it is not surprising that the Danaharta Act contain special provisions with special powers to enable Danaharta and the Special Administrators to achieve the purpose of the Act, particularly at times when the country is facing economic and financial turbulence. We are still in the process of recovering and Danaharta and the Special Administrators still have a long way to complete their missions as entrusted by the Danaharta Act. Therefore it is necessary for everybody, including the court, to interpret the provisions of the Danaharta Act along the missions which the Act wishes to achieve. That is the intention of the legislature in making the said Danaharta Act and that is the background that the Act should be given due recognition.

Whether Special Administrator Has Locus Standi To Initiate The Present Application

A Special Administrator is appointed for the affected person or company, (in the present case, the defendant), either under s. 23 or 24 of the Danaharta Act where Danaharta is satisfied that the affected person is unable or likely to be unable to pay its debt, or is unable or likely to be unable to fulfill its obligations to its creditors. The appointment is affected if Danaharta is satisfied that it would serve public interest to do so; or the survival of the affected person and its assets as a going concern; or a more advantageous realisation of the affected person's assets would be achieved than on a winding-up. Once appointed, the provision of the s. 41 of the Danaharta Act will come into effect. A moratorium of 12 months shall take effect (s. 41(2)). The duration of the moratorium can be further extended by Danaharta for a further period of 12 months or the duration required to complete the implementation of the proposal approved under s. 46 or 48 as the case may be, in which case it may be more than 12 months (s. 41(3)). The effect of the appointment of a Special Administrator is provided under s. 41(1) of the Danaharta Act which reads as follows:

41(1) Subject to subsection (6), on the appointment of the Special Administrator, a moratorium shall take effect during which:

(a) any petition for the winding up of the affected person shall be dismissed by the court;

(b) no resolution may be passed or order made for the winding up of the affected person;

(c) no receiver, receiver and manager or provisional liquidator, except any receiver, receiver and manager or provisional liquidator appointed by the relevant regulatory body in respect of any of the persons referred to in paragraph 27(c), may be appointed, or if appointed, his appointment shall immediately cease and he shall vacate his office;

(d) no steps may be taken:

(i) to create, perfect or enforce any security over any asset of the affected person;

(ii) to enforce a judgment over any asset of the affected person;

(iii) to re-possess any asset in the possession, custody or control of the affected person; or

(iv) to set off any debt owing to the affected person in respect of any claim against the affected person,

except with the prior written consent of the Corporation;

(e) no proceedings and no execution or other legal process may be commenced or continued with, and no distress may be levied against the affected person or its assets except with the prior written consent of the Corporation;

(f) any application made under section 176 of the Companies Act 1965 shall be adjourned sine die and any restraining order issued pursuant to subsection 176(10) of the Companies Act 1965 shall be immediately discharged and set aside; and

(g) no proceedings and no execution or other legal process may be commenced, or continued with, against any person providing a guarantee or acting as a guarantor for the liability of the affected person except with the prior written consent of the Corporation.

The plaintiff argued that the defendant company continues to exist after the Special Administrator was appointed and its board of directors continues to function. The plaintiff further argued that the Special Administrator appointed under the Danaharta Act, only has the powers to deal with the assets of the company, but the appointment does not vest the Special Administrator with the powers of the board of directors (as in the case of winding up). Therefore the plaintiff concluded that the Special Administrator, in the present case, has no *locus standi* to initiate the present application.

I think the plaintiff's contention on this issue is unsustainable and without merit. The powers of the Special Administrator provided under the Danaharta Act are very wide – much wider than the powers of a board of directors for a company in the ordinary sense. Section 30 of the Danaharta Act provides that the Special Administrator shall have the powers in the second schedule. There are 26 items listed under the second schedule regarding the powers of the Special Administrator. These powers include the power to remove or suspend from office any director of the affected person or appoint other persons to act as directors of the affected person notwithstanding the Memorandum and Articles of Association of the affected person or any other law (para. 2 second schedule). Obviously, this particular power is much wider than the powers of a board of directors of a company as provided under the Memorandum and Articles of Association, the Companies Act 1965 as well as other law. Besides that, the Special Administrator also has the power to perform any function and exercise any power that the affected person or any of its director or officers could perform or exercise if a Special Administrator had not been appointed. Paragraphs 7 and 8 of the Second Schedule provide the Special Administrator with the following powers:

> 7. Power to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions.
>
> 8. Power to bring or defend any action or other legal proceedings in the name and on behalf of the affected person.

Paragraphs 7 and 8 (above) clearly empowers the Special Administrator to initiate the present application (encl. 62) in the name and on behalf of the affected person ie, the defendant company, through the service of a solicitor appointed for that purpose.

Whether Section 41 Is Applicable

The defendant relied primarily on s. 41(1)(d)(ii) and (e) of the Danaharta Act which prohibits execution of a judgment on any asset of the affected person (the defendant) without the prior written consent of Danaharta. Section 41(1)(d)(ii) provides that during the duration of the moratorium period, no steps

may be taken to enforce a judgment over any asset of the affected person except with the prior written consent of Danaharta Corporation. Section 41(1)(e) further provides that no proceedings and no execution or other legal process may be commenced or continued with, and no distress may be levied against the affected person or its assets except with the prior written consent of Danaharta Corporation.

The question now is whether issuance and renewal of prohibitory order can be considered as a "step to enforce a judgment over the assets of the defendant". Or can it be considered as a "proceeding or execution or other legal process" against the defendant. Decided cases have clearly shown that prohibitory order is the first step in execution proceedings. The writ of seizure and sale can only be implemented by the sale of the land in question only when a prohibitory order is in force. In *Karuppiah Chettiar v. Subramaniam* [1971] 2 MLJ 116, the Federal Court has held that:

> It has to be borne in mind that the issue and the endorsement on the register document of title of a prohibitory order are but the first step in execution proceedings. The next step in the proceedings is for the judgment-creditor to apply for the sale of the land under O. 43 r. 11.

In *Ban Hin Lee Credit Sdn Bhd v. Utama Computer Centre Sdn Bhd & Ors* [1991] 1 CLJ 711; [1991] 2 CLJ (Rep) 332, it was held that:

> The combined effect of the relevant provisions in the Rules of the High Court 1980 and the National Land Code 1965 is that a sale of land in attachment proceedings must be carried out only when a prohibitory order registered against it, is in force. A void prohibitory order would vitiate the order for sale. The position is no different from where there has been no renewal of the prohibitory order.

In another case, *Keystart Sendirian Berhad v. Forgetech Sendirian Berhad* [1998] 2 AMR 1280 the High Court in Kuching has also held that "the issue and the endorsement on a register document of title, of a prohibitory order, are the first steps in execution proceedings, following which the application for the sale of the land is to be made." It was also decided in that case that "as provided by the Rules of the High Court, a prohibitory order could only be issued in execution of a judgment or order, involving the seizure of any immovable property of a judgment debtor."

On those authorities as well as the facts of the present case, I am fully satisfied that the prohibitory order applied by the plaintiff in this case is a "step to enforce a judgment" (ie, the judgment obtained against the defendant on 21 September 1998) over the assets of the defendant. It is also a "proceeding or other legal process" against the defendant.

The plaintiff argued that s. 41 of the Danaharta Act does not apply because the writ of seizure and sale and the prohibitory order were duly in force since October 1998, well before any vesting of right in the Special Administrator, who was only appointed on 9 September 1999. Therefore the plaintiff argued that the Danaharta Act cannot be retrospective in effect. The plaintiff further argued that all the subsequent renewal or extension of the said writ and prohibitory order are not to execute or to take steps to execute the judgment but merely to maintain the *status quo*, and therefore are not caught by s. 41 of the Danaharta Act.

With respect, I cannot agree with the above arguments of the plaintiff. The life of a prohibitory order, unless extended by order of a court, shall be six months from the date thereof. An extension of the said prohibitory order shall not have effect until a copy thereof is presented for registration before a prohibitory order lapses. In *Ban Hin Lee Credit Sdn Bhd v. Utama Computer Centre Sdn Bhd & Ors* [1991] 1 CLJ 711; ([1991] 2 CLJ (Rep) 332) Edgar Joseph Jr. has ruled:

> Similarly, if a judgment creditor fails to obtain an order of court extending the life of a prohibitory order and it expires it will be ineffective to authorise the seizure of the land or the interest therein for sale.

At p. 717 (p. 340), His Lordship went on:

> I need hardly say that any of those orders if void would vitiate the order for sale since this would interrupt the continuity of the life of the prohibitory order. The position therefore is no different from a case where there has been no renewal of a prohibitory order.

I have concluded earlier that the issuance of a prohibitory order is the first step in execution proceedings and the next step is for the judgment creditor to apply for sale of the land under O. 43 r. 11 of the Rules of the High Court 1980. The renewal or extension of the prohibitory order is essential in order not to interrupt the continuity of the validity of the prohibitory order. If the continuity is interrupted and the prohibitory order lapsed then the sale of the land in the execution proceeding cannot be carried out. Therefore, each application made by the plaintiff to renew or extend the prohibitory order is considered as "steps taken to enforce a judgment over the asset of the defendant". If the application to renew or extend it is made after the appointment of the Special Administrator on 9 September 1999, then s. 41 of the Danaharta Act is applicable. Section 41(1)(e) of the Act is much more clearer on this point ie, no proceedings and no execution or other legal process may be commenced or continued with against the affected person except with the prior written consent of Danaharta Corporation. In the present case, even

a though the legal process or the execution proceeding was commenced before the appointment of the Special Administrator, the subsequent applications to renew or to extend the Prohibitory Order are considered as "continuation" of the proceeding and therefore s. 41(1) is still applicable if the applications were made after the appointment of the Special Administrator.

b That being the case, the application made by the plaintiff to renew or extend the writ of seizure and sale as well as the Prohibitory Order after the appointment of the Special Administrator for the defendant on 9 September 1999 must be with the prior written consent of Danaharta Corporation. As a matter of fact in the present case, it is not disputed that the plaintiff has not obtained c and failed to exhibit the existence of such consent.

The plaintiff argued that at all relevant times when the applications were made, the defendant was represented by a solicitor from Tetuan Haniff & Rajendran and the said solicitor has given his "consent" to all those applications. The d said solicitor from Tetuan Haniff & Rajendran *vide* his letter dated 25 March 2002 (exh. "K" to encl. 62A) has admitted that it was an oversight on his part to have given the consent to the application without having obtained specific instruction from the Special Administrator.

The provision of the law on this point is crystal clear. The only consent that e is required for any application under s. 41(1)(d) and (e) of the Danaharta Act is "the prior written consent of Danaharta Corporation". That is trite law which cannot be disputed. There is no other form of consent from any other person or authority can substitute the said written consent of Danaharta Corporation. The only authority which can give the consent under the law is Danaharta f Corporation and as provided under s. 41(7) of the Danaharta Act (as amended in 2000), any decision of the Corporation on this matter shall be final and binding and shall not be reviewed, quashed, appealed against or set aside by any court. Failure on part of the plaintiff to obtain the prior written consent of Danaharta Corporation would result in the applications and the relevant g orders be null and void. Section 41(8) of the Act (as amended in 2000) also provides that any person who contravenes sub-s. (1) commits an offence and shall on conviction be liable to a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding three years or both. On this ground alone, the court has no hesitation to hold that the h defendant's application *vide* encl. 62 should be granted with costs.

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Existence Of Special Circumstances

The defendant also argued that the plaintiff has not adduced any evidence in the application to renew or extend the prohibitory order as to the existence of special circumstances to enable the court to renew or extend the prohibitory order in question. The defendant cited the case of *Ban Hin Lee Credit Sdn Bhd (supra)* to support their contention that the court can only renew a prohibitory order upon proof of existence of special circumstances and the court must be satisfied that there exists good reason before exercising its discretion to extend a prohibitory order. On this issue, I am of the opinion that the existence of "special circumstances" is only relevant in cases where the applications are made in ordinary situation where the judgment debtor has not been placed under Danaharta under the Danaharta Act. In cases where the judgment debtor has been placed under Danaharta and Special Administrator has been duly appointed, then the issue of "special circumstances" becomes irrelevant. Under the Danaharta Act, particularly s. 41, all such applications require the prior written consent of Danaharta Corporation, irrespective of whether there exists "special circumstances" or not. If there is no prior written consent as required, the application and the subsequent order made by the court shall be invalid, notwithstanding that there are "special circumstances" in existence at the time of the application.

Implementation Of Proposal Approved By Danaharta

In carrying out their duties under s. 44 of the Danaharta Act, the Special Administrator has prepared a proposal with respect to the affected person ie, the defendant, particularly relating to the position of the creditors. The proposal was prepared on the findings that the defendant has no secured creditors at the relevant times. The proposal was later approved by Danaharta under s. 45(2) of the Danaharta Act which provides:

> The Corporation may approve the proposal for implementation once the Corporation has received the proposal together with the Independent Advisor's report.

Section 46(4)(b) of the Danaharta Act provides further that if there are no secured creditors of the affected person known to the Special Administrator and Danaharta Corporation approves the proposal under s. 42(2), the proposal shall be binding on the affected persons, all members and creditors of the affected person and any other person affected by the proposal, whether or not the person had knowledge or notice of the proposal. The said proposal was published in two local newspapers on 27 November 2001 as required under s. 47(2) of the same Act. That being the case, the Special Administrator is required by law and shall implement the proposal in accordance with its terms under s. 47 of the Act. Section 47(3) of the Act also provides that, notwithstanding the

provisions of any law or contract, a proposal approved under the Act may be implemented and the Special Administrator shall have the power to implement and to do all things necessary to fully and effectively carry out and give effect to the proposal without the need for any notice to or approval or consent of any member or creditor of the affected person or any other person affected by the proposal or approval or confirmation by the court.

The defendant contended that so long as the writ of seizure and sale and the prohibitory order are still on the register of the document of title of the said land in question, the said proposal which the Special Administrator is duty bound to implement, could not fully and effectively be carried out. If that happened, it may defeat the purpose of the Danaharta Act and the intention of the legislature is bound to fail.

The court fully agrees with the above contention, and decided that the most appropriate action to be taken at the present stage is to set aside and to cancel the registration of the writ of seizure and sale as well as the prohibitory order as applied by the defendant in encl. 62.

Abuse Of The Process Of The Court

It is not disputed that three pieces of the land in question ie, PN 2809 Lot 49649; PN 2816 Lot 49856 and PN 2817 Lot 49657 have been surrendered to the State Government as of April 2001 ie, five months before the last application made by the plaintiff to renew or extend the writ of seizure and sale as well as the prohibitory order. The plaintiff has failed to inform the court about the matter and thus the Order made by the court on 28 September 2001 granting renewal or extension of the prohibitory order in respect of all the five pieces of land (including the three pieces which have been surrendered to the State Government) is misleading and surely could not be affected. By not informing the court the actual position of the land and proceeded to apply for renewal or extension of the prohibitory order in respect of all those land, the plaintiff is abusing the process of the court.

The plaintiff was, at all material times, represented by solicitors. The said prohibitory order was renewed or extended for seven times since it was first issued on 16 October 1998. On the 3rd to 7th applications for renewal, the plaintiff has stated as one of the reasons for such application that "Special Administrator has been appointed for the defendant". This clearly shows that the plaintiff or the solicitors who was acting for the plaintiff knew that at that point of time, a Special Administrator has been appointed for the defendant. And yet in their affidavit opposing the defendant's application, affirmed by Chua Eng Hai on 8 April 2002 (particularly paras. 4 and 6) the plaintiff claimed that they have no knowledge about the appointment of the Special Administrator

for the defendant. This clearly shows that the plaintiff is not sincere and not *bona fide* in dealing with this matter. Again the conduct of the plaintiff or the said Chua Eng Hai (representing the plaintiff) can be considered as an abuse of the process of the court.

In the same affidavit opposing the defendant's application (particularly para. 11) the said Chua Eng Hai claimed that the intention of the plaintiff to get the Prohibitory Order renewed and extended from time to time is to maintain *"status quo"* of the plaintiff's interest on the land in question.

The counsel for the plaintiff in their written submissions strengthened this statement by submitting that the plaintiff's purpose in maintaining the validity of the prohibitory order was always to maintain the *status quo* existing before Danaharta's intervention on 9 September 1999. The counsel further submitted that "this naturally gives and preserves the plaintiff's right to take action at the appropriate time against Danaharta and/or the Special Administrator for non-compliance with the express provisions of the Danaharta Act".

Again, what the plaintiff is doing is clearly an abuse of the process of the court. From the above disclosures, I am of the impression that the prohibitory order was renewed or extended by the plaintiff for a collateral purpose ie, to maintain the *status quo* in order to give or preserve the plaintiff's right to take appropriate action at the appropriate time against Danaharta and/or the Special Administrator for non-compliance with the express provisions of the Danaharta Act and not for the purpose of an execution of a judgment by way of seizure and sale. As provided by the Rules of the High Court 1980, a prohibitory order could only be issued in execution of a judgment or order, involving the seizure of any immovable property of a judgment debtor. In *Mallal's Supreme Court Practice*, vol. 1 (2nd edn) at p. 225 it provides that:

> The process of the Court must be used *bona fide* and must not be misused. The Court will prevent the improper use of the Court process and will in a suitable case do so summarily where it has been used vexatiously and opppressively: *Castro v. Murray* [1875] 10 Ex 213; *Dawkins v. Prince Edward of Saxe Weimar* [1876] 1 QBD 499.

In *Keystart Sendirian Berhad v. Forgetech Sendirian Berhad (supra)* the High Court in Kuching has set aside the prohibitory order forthwith on one of the grounds that the lodging of the prohibitory order by the plaintiff merely to prevent the receiver and manager from selling the said land first, is clearly an improper use of the court process. It was also ruled in that case that:

The rules clearly provide that the prohibitory order must be obtained in execution of a judgment or order, involving the seizure of the immovable property of a judgment debtor or any registered interest therein and not merely to prevent another party from disposing of the land as happened in our case.

Conclusion

In the circumstances and for all the reasons stated, I find there is merit in the Danaharta's application as in encl. 62. I will therefore allow the application with costs and order in terms of prayers applied for.